

DAVID H. KRAMER, SBN 168452
 MENG JIA YANG, SBN 311859
 WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation
 650 Page Mill Road
 Palo Alto, CA 94304-1050
 Telephone: (650) 493-9300
 Facsimile: (650) 565-5100
 Email: dkramer@wsgr.com
 Email: mjyang@wsgr.com

BRIAN M. WILLEN (*admitted pro hac*)
 BENJAMIN D. MARGO (*admitted pro hac*)
 WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation
 1301 Avenue of the Americas, 40th Floor
 New York, NY 10019-6022
 Telephone: (212) 999-5800
 Facsimile: (212) 999-5801
 Email: bwillen@wsgr.com
 Email: bmargo@wsgr.com

AMIT Q. GRESSEL, SBN 307663
 WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation
 One Market Plaza
 Spear Tower, Suite 3300
 San Francisco, CA 94105-1126
 Telephone: (415) 947-2000
 Facsimile: (415) 947-2099
 Email: agressel@wsgr.com

STEFFEN N. JOHNSON (*admitted pro hac*)
 WILSON SONSINI GOODRICH & ROSATI
 Professional Corporation
 1700 K Street NW, Fifth Floor
 Washington, DC 20006-3817
 Telephone: (202) 973-8800
 Facsimile: (202) 973-8899
 Email: sjohnson@wsgr.com

Attorneys for Defendants
 YOUTUBE, LLC and SUNDAR PICHAI

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

DONALD J. TRUMP, KELLY VICTORY,
 AUSTEN FLETCHER, AMERICAN
 CONSERVATIVE UNION, ANDREW
 BAGGIANI, MARYSE VERONICA JEAN-
 LOUIS, NAOMI WOLF, and FRANK
 VALENTINE,

Plaintiffs,

v.

YOUTUBE, LLC and SUNDAR PICHAI,

Defendants.

CASE NO.: 4:21-cv-08009-JSW

**DEFENDANTS YOUTUBE AND
 SUNDAR PICHAI'S OPPOSITION
 TO PLAINTIFFS' MOTION TO
 CONSOLIDATE**

Hon. Jeffrey S. White

Hearing information:

Date: February 4, 2022

Time: 9:00 AM

After vehemently resisting relating this action to *Trump et al. v. Twitter, Inc. et al.*, No. 3:21-cv-08378-JD (“*Twitter*”) when both were pending in the Southern District of Florida (Dkt. 57), Plaintiffs made an about-face and filed an administrative motion to relate the cases under Local Rule 3-12 (Dkt. 118) (“*Mot.*”). This Court rejected that motion, determining “that no cases are related and no reassignments shall occur.” Dkt. 123 at 2. Unwilling to accept the Court’s ruling, Plaintiffs now bring a motion under Fed. R. Civ. P. 42(a) to reassign the *Twitter* action from Judge Donato and consolidate it with this case and *Trump et al. v. Facebook, Inc. et al.*, No. 4:21-cv-09044-JSW (“*Facebook*”), which was randomly assigned to this Court after its transfer from Florida. Dkt. 125. Because Plaintiffs should not be permitted to use Rule 42 to override the mechanism for relating cases assigned to different judges in this Court, and because formal consolidation of these three cases (which involve largely different plaintiffs suing different defendants) is unwarranted, Defendants YouTube and Sundar Pichai (collectively “YouTube”) oppose Plaintiffs’ motion.

STATEMENT OF ISSUES TO BE DECIDED

1. Whether the Court should apply Fed. R. Civ. P. 42(a) to reassign to this Court and consolidate with this case a separate case pending before another Judge in this District that this Court has already determined not to be a related case under Local Rule 3-12 and where the Court has already concluded that “no reassignments shall occur.”

2. Whether Plaintiffs have provided sufficient justification for this Court to exercise its discretion under Rule 42(a) to consolidate this case with the two actions against different defendants that Plaintiffs chose to file as separate cases.

ARGUMENT

A. Plaintiffs’ Effort To Circumvent This Court’s Related-Case Order By Seeking Reassignment Of The *Twitter* Action Should Be Rejected

Local Rule 3-12 is the mechanism this District has created for determining when two or more cases assigned to different Judges should be related and reassigned. The Rule reflects the collective judgment of this District that such reassignments should not occur unless two conditions are met: (1) the “actions concern substantially the same parties, property, transaction or event”;

1 and (2) it “appears likely that there will be an unduly burdensome duplication of labor and expense
 2 or conflicting results if the cases are conducted before different Judges.” Civ. L.R. 3-12(a)(1), (2).
 3 Thus, when potentially similar cases are pending before different judges, the Court should first
 4 determine relatedness under Local Rule 3-12, and only if a case is deemed related and reassigned
 5 pursuant to that Rule should the Court potentially exercise its discretion to consolidate the actions
 6 under Rule 42. *See, e.g., Mullur v. QuantumScape Corp. (In re QuantumScape Sec. Class Action*
 7 *Litig.)*, 2021 U.S. Dist. LEXIS 97785, at *4-5 (N.D. Cal. May 18, 2021) (finding relatedness of
 8 cases before other judges prior to consolidating them) (Orrick, J.); *Corephotonics, Ltd. v. Apple,*
 9 *Inc.*, 2018 U.S. Dist. LEXIS 170408, at *13 (N.D. Cal. Oct. 1, 2018) (Koh, J.) (same).

10 Here, that threshold determination has already been made. Plaintiffs filed an administrative
 11 motion under Local Rule 3-12 seeking to relate the *Twitter* case to this one, and this Court
 12 determined that “no cases are related and no reassignments shall occur.” Dkt. 123 at 2. Now,
 13 however, Plaintiffs attempt to circumvent that ruling—and indeed, the entire intra-district
 14 reassignment scheme created by this District’s Civil Local Rules—by seeking the same relief in
 15 the guise of a motion to consolidate under Fed. R. Civ. P. 42(a). Under Plaintiff’s approach, the
 16 specific standards for relatedness set out in the Local Rules would be effectively nugatory. Any
 17 party unable to meet those standards could take another bite at the apple under Rule 42—or perhaps
 18 just avoid invoking Local Rule 3-12 at all. Indeed, Plaintiffs’ consolidation motion amounts to a
 19 (procedurally and substantively) improper request to reconsider this Court’s order denying
 20 relatedness. *Cf.* Civ. L.R. 7-9.

21 It is unsurprising, therefore, that Plaintiffs do not cite a single case in which any court in
 22 this District has ever done what they now propose.¹ In fact, courts have consistently rejected efforts
 23 to consolidate cases pending before different judges that do not meet the standards for relatedness

24 ¹ That includes *Jackson v. City and County of San Francisco*, 2010 WL 11582918, at *1 (N.D.
 25 Cal. Dec. 16, 2010), on which Plaintiffs rely (Dkt. 125 at 1). Though that case suggested that
 26 “denial of a motion to relate under Rule 3-12 does not *automatically* preclude consolidation,” the
 27 court went on to say that “it does not follow that consolidation is appropriate every time there is
 28 some common question of law or fact, without regard to issues such as those identified in Rule 3-
 12.” *Id.* (emphasis added). And the court ultimately *rejected* consolidation, holding that “while . . .
 the threshold requirement under Rule 42 that there be ‘a common question of law or fact’ is
 satisfied here, the circumstances as a whole do not warrant consolidation.” *Id.* at *2.

under Local Rule 3-12. *See, e.g., Allan v. Experian Info. Sols., Inc.*, 2017 U.S. Dist. LEXIS 20906, at *2 (N.D. Cal. Feb. 14, 2017) (Freeman, J.) (refusing to consolidate, observing that neither Federal nor Local rules “authorize transfer of cases from one judge to another absent a determination that the cases are related under Civil Local Rule 3-12”); *Lugo v. Experian Info. Sols., Inc.*, 2017 WL 11577918, at *2 (N.D. Cal. Feb. 6, 2017) (Davila, J.) (refusing to consolidate and observing that relation under Local Rule 3-12 “seems a necessary precursor to consolidation”).² The Court should do the same here. There is no basis to use Rule 42(a) to reassign from Judge Donato a case that has already been deemed not to be related to this one. This Court’s ruling that the cases do not meet the standards for relatedness and intra-district reassignment under Local Rule 3-12 should control how the Court exercises its discretion in regard to consolidation of those same cases under Rule 42(a).

B. *Twitter and Facebook Should Not Be Fully Consolidated with this Case*

Beyond Plaintiffs’ improper effort to evade this Court’s ruling and the Local Rules, this Court should not exercise its discretion under Rule 42 to consolidate this case with either the *Twitter* case or the *Facebook* case. *Cf. Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018) (“District courts enjoy substantial discretion in deciding whether and to what extent to consolidate cases.”). While Plaintiffs are unclear about what they are actually seeking by way of their consolidation request, YouTube opposes any effort either: (1) to reassign the *Twitter* case to this Court; or (2) to merge this case with the *Facebook* action for all pre-trial proceedings. Plaintiffs have not shown that “the interest of judicial convenience” outweighs “the potential for delay, confusion and prejudice caused by consolidation” to such an extent as to justify either of those outcomes. *Sw. Marine, Inc. v. Triple A Mach. Shop, Inc.*, 720 F. Supp. 805, 807 (N.D. Cal. 1989); *accord Cleveland v. Ludwig Inst. for Cancer Rsch. Ltd.*, 2021 WL 2780234, at *2 (S.D. Cal. July 2, 2021) (“[E]ven where a

² *Accord Hughes v. Experian Info. Sols., Inc.*, 2017 WL 975969, at *2 (N.D. Cal. Mar. 13, 2017) (Tigar, J.); *Anderson v. Experian Info. Sols., Inc.*, 2017 U.S. Dist. LEXIS 20907, at *1-3 (N.D. Cal. Feb. 14, 2017) (Freeman, J.); *Basconcello v. Experian Info. Sols., Inc.*, 2017 U.S. Dist. LEXIS 8402, at *2 (N.D. Cal. Jan. 20, 2017) (Hamilton, J.); *Burrows v. Experian Info. Sols., Inc.*, 2017 U.S. Dist. LEXIS 8400, at *2-3 (N.D. Cal. Jan. 20, 2017) (Hamilton, J.); *Olsen v. Experian Info. Sols., Inc.*, 2017 U.S. Dist. LEXIS 8398, at *2 (N.D. Cal. Jan. 20, 2017) (Hamilton, J.).

1 common question exists, consolidation is inappropriate if it leads to inefficiency, inconvenience,
2 or unfair prejudice to a party.”) (citation omitted).

3 As an initial matter, in demanding that the Court join these three cases together, Plaintiffs
4 inexplicably seek to reverse their own strategic choices. These cases were filed against YouTube,
5 Twitter, and Facebook on the same day by the same Plaintiffs’ counsel. In doing so, Plaintiffs
6 elected to file them as three separate actions in the Southern District of Florida. Those cases were
7 duly assigned to three different judges, and Plaintiffs’ counsel then vigorously opposed having
8 them reassigned to a single judge—even under the relaxed standard for relatedness in the Southern
9 District of Florida. *See* S.D. Fla. Internal Operating Procedures § 2.15.00 (cases are related where
10 for any reason “the disposition thereof would appear to entail the unnecessary duplication of
11 judicial labor if heard by a different Judge”); Dkt. 57 ¶ 5 (Plaintiffs arguing that the three cases
12 “involve distinct and detailed factual inquiries, with little commonality between each case”). And
13 Plaintiffs’ position prevailed: the three cases remained separate, resulting in three separate rulings
14 transferring each case to this District. Plaintiffs do not even try to explain why they have now
15 flipped their approach and are insisting that the cases be consolidated and brought before a single
16 judge, even in the face of this Court’s rejection of that exact outcome. Nor do Plaintiffs explain
17 why consolidation now would advance the same considerations of judicial economy that they
18 expressly denied it would serve in Florida. *See id.* ¶ 6 (“[I]t was and remains the position of the
19 Plaintiffs that the goals of the Related Case Provisions, namely judicial economy, would not be
20 served by these three cases being brought before one court[.]”).

21 And while the cases undeniably raise some similar legal issues, there are many important
22 differences among them. The three cases involve different parties, different online services,
23 different content, and different moderation decisions. As to the parties, Plaintiff Trump is joined
24 by a different cast of named plaintiffs in each case; there are no common defendants. As to the
25 nature of the online services, YouTube is a platform for sharing videos, whereas, by Plaintiffs’
26 description, Facebook offers a “service for people ‘to talk openly about the issues that matter to
27 them,’” *Facebook* Am. Compl. ¶ 2, and Twitter provides a “microblogging service” featuring short
28 messages known as “tweets.” *Twitter* Am. Compl. ¶ 28. Each one has its own terms of service, its

own rules for content moderation, and its own practices for moderating user-generated content. As to the alleged key events, the complaints focus on a hodgepodge of moderation decisions by YouTube, Facebook, and Twitter that were made by different people at different companies reviewing different content posted by different users on different platforms.

Those significant differences would overwhelm the handful of common legal issues if the cases were consolidated. *See, e.g., Miesegaes v. Allenby*, 2020 WL 5413021, at *1 (C.D. Cal. Aug. 6, 2020) (“Even though there may be some overlap in the law on the two substantive due process claims in the two actions, any efficiency from consolidating the actions would be minimal considering the different underlying facts.”); *Jackson v. Berkey*, 2020 WL 1974247, at *2 (W.D. Wash. Apr. 24, 2020) (denying consolidation where “any pre-trial motions which encompass Plaintiff’s allegations across all three cases would involve separate and distinct evidence requiring separate evaluations and analyses”). Forcing the parties to combine fact discovery, any expert discovery, and summary judgment proceedings would only cause confusion and inefficiency; it would waste the Court’s time trying to disentangle the consolidated cases to judge each one fairly on its own facts and circumstances. *See Jackson*, 2020 WL 1974247, at *2 (consolidation is inappropriate if it “would cause delays and confusion as the resolution of issues from all three cases would be embedded in single or multiple, likely unwieldy, orders or report and recommendations”); *Chavez v. Experian Info. Sols., Inc.*, 2017 U.S. Dist. LEXIS 20923, at *3 (N.D. Cal. Feb. 14, 2017) (observing that “[s]hould these cases make it past the pleading stage, much of the discovery and many of the factual issues will be individualized”).

Moreover, the overlapping legal issues do not warrant either reassignment of the *Twitter* action or formal consolidation of any of the cases. As discussed in YouTube’s motion to dismiss, this District has had numerous recent cases that have raised virtually identical legal claims and questions as those here – including whether YouTube and other online service providers are state actors, whether statements by public officials amount to government coercion or joint action, and whether Section 230 is unconstitutional. None of those cases has been consolidated – or even treated as related. That has not created any problem of inefficiency or inconsistent results – to the contrary, courts have been uniform in their (prompt) rejection of these meritless claims as a matter

1 of law. *See Doe v. Google LLC*, 2021 U.S. Dist. LEXIS 201377, at *3-19 (N.D. Cal. Oct. 19, 2021)
 2 (Freeman, J.) (rejecting First Amendment claim against YouTube); *Daniels v. Alphabet Inc.*, 2021
 3 U.S. Dist. LEXIS 64385, at *13-21 (N.D. Cal. Mar. 31, 2021) (DeMarchi, J.) (same); *Children’s*
 4 *Health Def. v. Facebook Inc.*, 2021 U.S. Dist. LEXIS 121314, at *30-46 (N.D. Cal. June 29, 2021)
 5 (Illston, J.) (rejecting same claim against Facebook), *appeal filed*, No. 21-16210 (9th Cir. July 21,
 6 2021); *Newman v. Google LLC*, 2021 U.S. Dist. LEXIS 119101, at *25-31, *40-43 (N.D. Cal. June
 7 25, 2021) (Koh, J.) (rejecting First Amendment claim against YouTube and dismissing claim
 8 seeking declaration that Section 230 is unconstitutional); *Divino Grp. LLC v. Google LLC*, 2021
 9 U.S. Dist. LEXIS 3245, at *12-22 (N.D. Cal. Jan. 6, 2021) (DeMarchi, J.) (rejecting First
 10 Amendment claim against YouTube); *Lewis v. Google LLC*, 461 F. Supp. 3d 938, 952-53 (N.D.
 11 Cal. 2020) (Kim, J.) (same), *aff’d*, 851 F. App’x 723 (9th Cir.), *cert. denied*, 142 S. Ct. 434 (2021).
 12 There is no reason to do anything different here. This Court is fully capable of resolving the issues
 13 raised by YouTube’s pending motion to dismiss, just as Judge Donato can resolve those raised by
 14 Twitter’s motion.

15 At a minimum, Plaintiffs’ request for consolidation is premature at this very early stage of
 16 litigation. That is especially so because Plaintiffs do not articulate what they are actually seeking
 17 by way of consolidation; they do not describe the extent to which they think the cases should be
 18 merged or how consolidation would work throughout the remaining phases of litigation. It would
 19 be more efficient to resolve the pending motions to dismiss (and preliminary injunction motions)
 20 and see what is left of the cases at that point. Indeed, many “[c]ourts have concluded that
 21 consolidation is premature when motions to dismiss are pending.” *Benson v. Fischer*, 2019 WL
 22 332434, at *2 (D. Minn. Jan. 25, 2019); *accord Rancho Agricola Santa Monica, S. de R.L. de C.V.*
 23 *v. Westar Seeds Int’l, Inc.*, 2009 WL 3148756, at *2 (S.D. Cal. Sept. 29, 2009) (“The potentially
 24 significant legal and factual differences between the two actions caution against the premature
 25 consolidation of the two actions.”).

26 Of course, this Court has inherent authority to manage the two cases now pending before
 27 it (the *YouTube* and *Facebook* actions) in ways that will facilitate “just, speedy, and inexpensive
 28 determination” of those actions. Fed. R. Civ. P. 1. But formal consolidation of those cases is neither

1 necessary to advance the goal of judicial economy nor warranted by the circumstances. *Cf. United*
2 *States v. Mysin*, 2018 WL 6620343, at *2 (E.D. Cal. Dec. 18, 2018) (declining to consolidate cases
3 because the court already intended to “call both related cases for sentencing on the same date and
4 time”).

5 **CONCLUSION**

6 Plaintiffs’ motion to consolidate this case with the cases pending against Twitter and
7 Facebook should be denied.

8
9 Dated: December 15, 2021

Respectfully submitted,

10 WILSON SONSINI GOODRICH & ROSATI
11 Professional Corporation

12 By: /s/ Brian M. Willen

Brian M. Willen

bwillen@wsgr.com

14 Attorneys for Defendants
15 YOUTUBE, LLC and SUNDAR PICHAI
16
17
18
19
20
21
22
23
24
25
26
27
28